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ABSTRACT

Broad influences impinge upon the question of "full disclosure," a question that asks what information about the conduct of public affairs should be made available to the public. Increasingly, state laws require the disclosure of all information about the conduct of public business, the receipt and expenditure of public funds, and the outcomes of public programs to any person who seeks such information. Legal requirements are making pledges of confidentiality more difficult to keep. Records are becoming more easily available to those who are the subjects of such records, although such personal records are becoming less subject to public scrutiny. The implications for institutions of higher education are many. Among them are the necessity of developing guidelines for the collection, storage, and dissemination of information and advisability of adopting a common language and standard definitions and procedures for reporting institutional information. (Author/HS)

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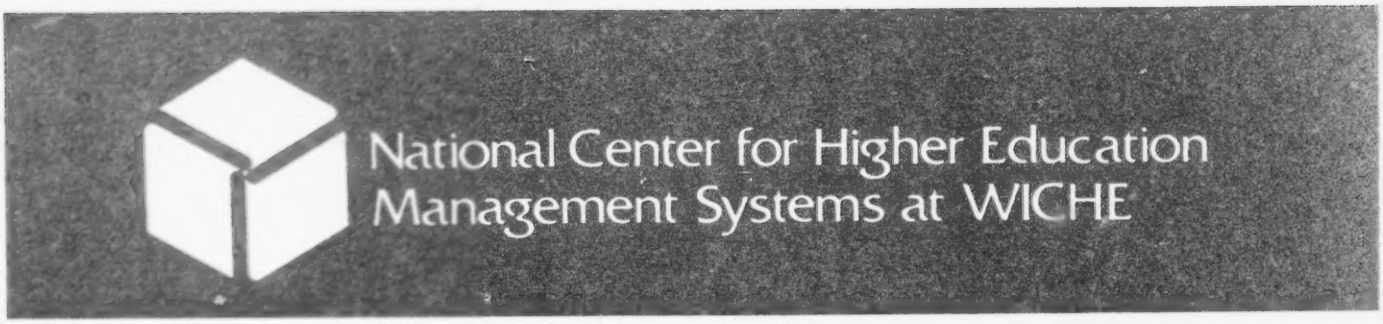

FULL DISCLOSURE:

NEW AND RESPONSIBLE ATTITUDES

Joanne E. Arnold

1972

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FOREWORD

In this paper I have attempted to address some of the more salient issues that impinge upon a consideration of new and responsible attitudes toward "full disclosure." The issues, I think, are philosophical, historical, ethical, and legal in nature. I have not attempted to offer a complete or detailed discussion in this paper, since its purpose has been to serve as background material for members of a panel whose mission was to discuss "full disclosure" at the NCHEMS National Assembly on September 13, 1972, in Denver, Colorado.

I have tried to suggest here the direction these influences appear to be taking us. It has not been my purpose to describe the technical procedures that will be required of us to keep up.

The subject of "full disclosure" is a broad and complicated one, and I am grateful for the helpful contributions to this paper made by Mr. Thomas A. Potter, Mrs. JoAn Segal, Mrs. Carol Sterrett, and Miss Linda Starck.

--Jo Arnold
November 1, 1972

ABSTRACT

Broad influences impinge upon the question of "full disclosure," a question that asks what information about the conduct of public affairs should be made available to the public. Basic democratic American ideals--reinforced by history, tradition, and law--appear to tip the balance toward full disclosure, exempting only that information that would tend to violate an individual's right of personal privacy.

Increasingly, state laws require the disclosure of all information about the conduct of public business, the receipt and expenditure of public funds, and the outcomes of public programs to any person who seeks such information.

Legal requirements are making pledges of confidentiality more difficult to keep. Records are becoming more easily available to those who are the subjects of such records, although such personal records are becoming less subject to public scrutiny.

The implications for institutions of postsecondary education are many. Among them are the necessity of developing guidelines for the collection, storage, and dissemination of information and advisability of adopting a common language and standard definitions and procedures for reporting information about itself.

FULL DISCLOSURE: NEW AND RESPONSIBLE ATTITUDES

When those in higher education discuss "full disclosure," they are considering, essentially, what information about the conduct of their endeavors should be made available to the public. Broad philosophical influences impinge upon any consideration of what has become known as "full disclosure," and the sections that follow will discuss those that appear to be the most compelling.

The Democratic Ideal

Tax-supported institutions of education are clearly and correctly thought of by the public as agencies of government. They exist through the consent and with the financial support of the public. As government agencies, such public institutions fall into that broad category of "government" whose activities are subject to public scrutiny. Indeed, it is the democratic ideal that they should.

As early as the opening of the eighteenth century, the existing system of information control was dying. The power of the Crown to regulate information had diminished, and by the end of the century, freedom of expression was assured in constitutional phrases in the fundamental law of England. Among those who made significant contributions to this basic change in philosophy and law were John Milton in the seventeenth century, John Erskine and Thomas Jefferson in the eighteenth, and Stuart Mill in the nineteenth.

Jefferson was firmly convinced that while individuals might sometimes err in exercising their reason, the majority would inevitably make sound group decisions. To enhance this decision-making process, Jefferson believed that a society's citizens should be educated and informed, and he believed that the press should function free of government control in order to inform and guide the public. In his Second Inaugural Address, Jefferson proclaimed that a government that could not stand up under criticism deserved to fall and that the real strength of a government was its willingness to permit and its ability to withstand public criticism. He believed that government should be carefully scrutinized by the public and that the press should represent the public as "watchdogs" of government agencies and institutions.

More recent democratic ideals have established the "public's right to know." Basic in contemporary philosophy is the assumption that only an informed citizenry can make those wise decisions at the polls that are necessary for successful democracy. Thus, Americans today demand and receive information about the costs and conduct of war, about the costs and conduct of space explorations, of poverty, the economy, foreign relations, peace negotiations, and so on. That information bears directly on the choices they will make as the electorate. Similarly, they are asking questions about the costs and conduct of higher education, and that information will bear upon the choices they make in choosing those they wish to govern education.

A related assumption declares the citizen's right not only to know how his money is being spent and the quality of services and products he is buying with

his tax dollars, but also to participate more directly in the decision-making process. These assumptions clearly imply the right of access to government sources of information.

In 1913 in The New Freedom, Woodrow Wilson said:

> I, for one, have the conviction that government ought to be all outside and no inside. I, for my part, believe that there ought to be no place where anything can be done that everybody does not know about. . . . Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety. . . . Government must, if it is to be pure and correct in its process, be absolutely public in everything that affects it.

Indeed, in July of this year, Vice-President Agnew, in perhaps an uncharacteristic statement, said:

> The government official's right and power to administer his office is and should be subject to the responsible surveillance of an independent press. Far from being threatened, the public interest is enhanced by such responsible journalism.

Public servants, whose tenure depends in large part on public opinion, may be tempted to control information. Therefore, as the Commission on Freedom of the Press said in 1947:

> . . . Government must set limits on its capacity to interfere with, regulate, or suppress the voices of the press or to manipulate the data on which public judgment is formed.

> Government must set the limits on itself, not merely because freedom of expression is a reflection of important interests of the community, but also because it is a moral right. It is a moral right because it has an aspect of duty about it.

An increasingly sophisticated public, aware of the ideal of participative democracy, demonstrates today a reluctance to accept governance by a remote elite. In this era of the Pentagon Papers, the question of "full disclosure" is coming down hard, perhaps not so much as a question but as a mandate.

The Law

Historically, the legal issues faced today developed from the system of law in England called "Common Law." Common law declares that the public has the right to inspect public records as a protection against secrecy in government. To protect the rights of individuals, a series of conditions must be met by anyone wishing to inspect public records. He must not interfere with the operation of the agency where the records are kept; he must have a legitimate interest in the records; he must handle the records with care; and he must carry out the inspection during reasonable hours at the place where the records are kept (Foley, 1970).

Most institutional records meet the criteria set for public records, and therefore fall under the jurisdiction of common law. The criteria require that the records are under the care of a public officer, that they are authorized by

law, that they are accurate and durable, and that they are written memorials. Generally, there is no single test that may be applied to determine what are and what are not public records. In some states the primary source is statutory definition; in most states the primary source is court decisions; in all states the courts are the final source either in declaring common law or interpreting a statute.

In general, states may be said to fall into one of three categories: (1) general inspection states, where there is a general right of inspection of such records as are determined to be public by statutory and judicial definition and tests; (2) specific statute states, where a right of inspection of records is allowed by a number of specific statutes that specifically enumerate those records not subject to public inspection; and (3) common-law states, where determination of the right of inspection is based on the common-law theory.

States have the power to grant by statute the right of inspection of public records to all persons, regardless of interest, and at the same time are free to withhold by statute the right of inspection of such records. The effect of most statutes is to eliminate the requirement of some special interest in the records to entitle anyone the right of inspection. Any legitimate purpose is sufficient. Some statutes have been construed to make public records subject to inspection irrespective of motive, and mere curiosity may be sufficient motive. Others relieve the applicant of having to prove a proper purpose. The right to inspect is subject to reasonable regulation, but such regulation

must not be of such an arbitrary nature as to deny the applicant the right granted him by law.

Most states have multiple statutes dealing with the problem of the public's right to know. Wisconsin's two statutes are typical:

Wisconsin Open Records Statute, Wisconsin Statutes § 19.21 (1969)

"(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.*

"(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).

"(3) Any person who violates any of the provisions of this section shall, in addition to any other liability or penalty, . . . forfeit not less than twenty-five nor more than two thousand dollars; such forfeiture to be enforced by a

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*Colorado law reads "the state or any agency, institution, or political subdivision thereof. . . ."

civil action on behalf of, and the proceeds to be paid into the treasury of the state, municipality, or district, as the case may be."

Subsection (1) describes all the records that are required by law to be kept, but it also extends to all other records or other property that a public official has in his office, whether he keeps them there as public records or not. This statutory formulation encompassing more than public records in the strict sense of records required to be kept by law is a common element of state open records statutes.

Wisconsin Anti-Secrecy Statute, Wisconsin Statutes § 66.77 (1969)

"(1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of government business.

"(2) To implement and insure the public policy herein expressed all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, except as provided in subsection (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any

such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.

"(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

(a) deliberating after judicial or quasi-judicial trial or hearing;

(b) considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employee or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employee or person charged, investigated, or otherwise under discussion;

(c) probation, parole, crime detection and prevention;

(d) deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions;

(e) financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

(f) conferences between any local government or committee thereof, or administrative body, and its attorney concerning the legal rights and duties of such agency with regard to matters within its jurisdiction."

The combination of open records and open meetings statutes is a fairly standard method of statutory treatment. Many states have comparable statutes.

The usual procedure for obtaining disclosure of public records at the state or local level is by seeking a writ of mandamus, a court order that compels the custodial official to make the records available for inspection or copying. In general, the writ will not be issued unless the party seeking it is entitled to the information as a matter of right. It is in the definition of "entitled as a matter of right" that the gradations in freedom of information occur. In some states, opinions have construed the statutes to mean that all persons may, as a matter of right, examine all public records. Other jurisdictions interpret the statutes as creating a right of inspection only in particular classes of persons or only for particular classes of documents.

The most common reason for denying disclosure of public information is the argument that such disclosure is available only to those who can demonstrate a legitimate interest in the information sought. In most jurisdictions that require a showing of interest, however, it is sufficient if the petitioner can show anything stronger than idle curiosity for wanting to inspect the records. A small minority of jurisdictions still adhere to the old common-law rule that the petitioner must show some compelling interest in the information sought to be able to require disclosure.

The second and by far less frequently used method of restricting access to public records is to characterize some records as confidential. This construction

is usually couched in terms of an exemption implied in the statute in question and is generally applied only to records of law enforcement agencies and records of juvenile court proceedings.

Confidentiality. At all levels, the education community has viewed confidentiality as solidly implicit in its relationship to students and others in a client role. Confidentiality is routinely offered by educational institutions to students, faculty, alumni, counselors, and psychologists in a variety of record-keeping and information-gathering situations. Recent court opinions, however, serve warning that many such promises of confidentiality may be empty, and they signal the need for a review of the legal aspects that bear on the concept.

Common law recognizes the relationship between attorney and client, husband and wife, between jurors, and between informer and government as confidential and privileged. Statute law has extended certain other relationships as special and extends the right of confidentiality to a physician regarding his patient and to a clergyman regarding his parishioner. In some states journalists, accountants, and psychologists are also included.

The pattern of legislation varies widely throughout the nation. By 1967 protection had been provided through statutes in 40 states and the District of Columbia for husband-wife relationships and in 38 states for attorney-client relationships. Six states had such legislation for psychiatrists-patients, 17 for psychologists-clients, 36 for physicians-patients, and 44 for clergymen-parishioners (Pardue et al., 1970).

It is not enough for custodians of information simply to declare records confidential. Common law describes four conditions that must be met before confidentiality is secure: (1) The communication must originate in a confidence that it will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between parties; (3) the relation must be one which, in the opinion of the community, ought to be carefully fostered; and (4) the harm to the relationship brought by the disclosure of the communication must be greater than the benefits thereby gained for the correct disposal of litigation (Litwack et al., 1969). The term *confidential* refers to the expectation of nondisclosure of communication; the term *privileged* denotes the legality of nondisclosure when disclosure is called for in judicial or quasi-judicial proceedings and the privilege of nondisclosure has been established by legislative enactment or judicial ruling (Pardue et al., 1970).

The Colorado Public Records Law of 1968 (113-2) demonstrates examples of such legislative enactment. The law provides that records--other than letters of reference concerning employment, licensing, or issuance of permits--containing "medical, psychological, sociological, and scholastic achievement data on individual persons" are not open for inspection *except* by the person who is the subject of such records or his duly appointed representative. It is perhaps worth special notice here that the records must be open to the person who is the subject of such records or to his representative. The law further provides, however, that such information may be transmitted to law

enforcement agencies and to pertinent educational institutions or school districts without written permission of the subject.

While the right of privileged nondisclosure appears to pertain to few classes of individuals, the confidentiality of personal information about individual persons is sometimes defined specifically by law, as in Colorado. Of great importance, however, is the recognition that both privilege and confidentiality are concepts intended as protections for the person who is the subject of the information, not the keeper of the information.

While deciding the case on different issues and although supporting the University of Wisconsin's claim that certain records entitled "Scholarly Activities Reports" were confidential and therefore not subject to disclosure under current law, a Wisconsin court commented in July 1971:

> If the University is going to make records for the purpose of compiling statistics to justify its budget, we question whether it should gather the information in confidence, as was done here, to prevent inquiry into the validity of the statistics and limit the information made public. This is a matter of policy to be determined by the Regents. The very fact that the information or source of the statistics is not fully revealed necessarily casts doubt on the conclusions reached by the statisticians and we cannot criticize the attempt made here by plaintiffs to get all of the information the University has in its computerized records. Either the statutes or the policy of the Regents should be reappraised and possibly changed if the policy makers so decide.

Other records, which the University had originally withheld from inspection, were ultimately disclosed as a result of court action.

It appears that pledges of confidentiality may, in many cases, be hard to keep. An opinion of the Wisconsin Department of Justice in 1971 stated:

> I would suggest that the following criteria be considered, however, in deciding whether a particular pledge of confidentiality comes within the exception, and will, therefore, hold up in court. First, there must have been a *clear pledge made*. Second, the pledge should have been made *in order* to obtain the information. Third, the pledge must have been *necessary* to obtain the information.
>
> Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in *each* instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records. (Italics added.)

Thus, public schools, school districts, and institutions of postsecondary education have been increasingly required by court action to allow inspection of student records, personnel information, survey data, and records pertaining to the receipt and expenditures of public funds by certain classes of "appropriate" persons. Such disclosure may be ordered in spite of a custodian's claim that such records are confidential and in spite of the records' having met the basic criteria for confidentiality. The thrust of recent court rulings sets precedents for the right of the student or his representative to examine any records of which he is the subject, whether they be admissions records, psychologists' reports, achievement scores, counselors' evaluations, or what have you. Other opinions point out that although certain records may otherwise meet the requirements for confidentiality, the greater good may come with the disclosure of such information.

Surveys have shown that few institutions have developed guidelines for the collection, storage, and dissemination of information, particularly personal client data (Marsh and Kinnick, 1970; Warner and Evangelista, 1970). Recent events suggest that such guidelines are becoming increasingly important and that serious thought needs to be devoted to the collection of data in terms of their quantity, content, and essentiality (Russell Sage Foundation, 1970; Goslin, 1970, 1971; Warner and Evangelista, 1970).

Further problems arise with growing doubts about the security of computer-stored data. It is encouraging to learn that IBM has announced a five-year cooperative program between IBM and users in a study of data security measures. Commenting on the study, T. Vincent Learson (1972) of IBM said, "Public policy must decide who is to have access to each type of information. It is the function of all of us in the computer industry to find better ways to limit access only to those who are authorized to have it." Perhaps solutions to this complex problem will be forthcoming.

Other Ethical Considerations

The ethical considerations that impact upon the "full disclosure" question converge from two sides: the necessity to protect an individual's right to privacy and thus insure his own control of the release of information about his beliefs, characteristics, and activities and the necessity to provide to all citizens the broadest possible information about the conduct of public business. The desirability of promoting both of these ethical "goods" is

compelling and basic to American philosophical assumptions. Certainly the law attempts to reflect both.

The notion of the right to privacy is vague and confusing. Such a right (and it is not really clear whether it is indeed a right, nor is its definition clear) has had somewhat nebulous and inconsistent interpretation over the years of American history. Current law seems to be moving toward a comprehensive right of personal and organization privacy, but it is difficult to predict just what form or content this emerging right will take. It has been suggested (Lister, 1970) that it is likely that unorthodox methods of data collection will be viewed skeptically, that negligent or willful misconduct will be severely penalized, and that protection of privacy will be guaranteed as essential for the exercise of political and civil rights. Beyond these propositions, it can be said only that there is a broad policy that dictates rigorous restrictions upon the quantity and character of the information that society may properly demand from its members. It is probably a universal ethical principle that individuals should enjoy the right of privacy of their legitimate personal affairs, particularly if the disclosure of that information would cause them distress, discomfort, or damage.

At the same time, ethical principle dictates that every citizen has the right to know about activities that are conducted with his consent and supported by his money. In reflecting this right, the law tends to lean heavily toward full disclosure, exempting only that information that would tend to violate an individual's right of privacy.

New and Responsible Attitudes

After a review of the historical, democratic, legal, and ethical influences that come to bear on the subject of full disclosure, one may question whether their thrust directs the higher education community to new attitudes or whether it leads to a renewal of old attitudes. Surely the trend is toward full disclosure, a trend propelled, no doubt, by an aware public desirous of playing the participant's role in democracy.

The implications of the growing trend toward full disclosure are disturbing to many institutions, as well they might be. Faced with questionable grounds for declaring records confidential or privileged, with greater demands for "account-ability," with a growing reluctance on the part of clients to supply "private" information, and with increasing demands on the part of all citizens to be privy to the affairs of public institutions, higher education must come to grips with the questions of full disclosure.

One obvious step for institutions to take will be to reassess the information they solicit and record, particularly those data included in student and personnel records. They might ask, do we need this information; is it relevant to our mission; can we get rid of it when it is no longer pertinent; is having this information worth taking the risk of having to disclose it at some later time? Unless such data are legitimate and necessary to the mission of the institution, it may be the better course not to gather them. We may have to control the computer-inspired temptation to keep more and more records and manipulate more and more data simply because we can.

Secondly, recognizing the trend toward full disclosure and the inevitability of comparison, higher education needs to develop a common language and standard definitions and procedures for reporting information about itself. While not specifically addressing the questions raised here, the Information Exchange Procedures Project at the National Center for Higher Education Management Systems at WICHE will offer one alternative for such comparable reporting. Such reporting is not without its dilemmas, and witness to that fact are the resources being expended in the NCHEMS project.

Some of the dilemmas are basic and are perhaps best described by Chalmers G. Norris of The Pennsylvania State University in a paper entitled "Potential State and Federal Uses of Information Generated through Information Exchange Procedures" (1972):

> Considerable controversy presently exists about the uses of information about higher education--both present and potential. Much has been written recently about this subject, including both alarmist and utopian predictions.
>
> On the one hand there are one-sided expositions of wholesale new benefits to result from availability of comparable data: more intelligent planning, more informed decision-making, more equitable resource allocations, improved efficiency and economy, even an occasional vision of improved effectiveness and relevance of academic programs.
>
> On the other hand there are one-sided excoriations of unmitigated evils to result from availability of detailed cost and output measures about specific academic and support programs: gross misapplications of noncomparable data causing grave harm to specific academic programs in specific institutions, undue interference in matters best decided only by academic people, or wholesale leveling and homogenization of programs and institutions.
>
> Whether or not the prognosis is favorable seems to depend largely on who is making the analysis. Academic administrators tend to stress

> the dangers, and government bureaucrats tend to stress the "benefits." Between the two extremes can be found a number of thoughtful discussions concerning technical obstacles to be overcome if comparable information about postsecondary education is to be made available for exchange and reporting.

To minimize the risks of misinterpretation, some administrators have recommended *maximum* disclosure of *precisely defined* information. The ultimate safeguard, they say, in the exchange of information is having well-informed users. Well-informed users of information are those who recognize the fact that comparative analysis of institutions and their programs cannot be made solely in terms of cost or financial data, but must also take into account qualitative measures and differences in institutional goals. If information is reported in well-defined, comparable terms and is accompanied by adequate information describing the institution, its goals, objectives, and programs, improper comparisons or misrepresentation of the facts will be less likely to occur (Marshall, 1972).

According to Leonard Romney (1972), NCHEMS IEP project director,:

> One of the hopes that information exchange offers is that higher education will be able to demonstrate that it can plan and manage effectively and deserves an opportunity to exercise greater control over its own operations. This contains the potential for lessening external controls and returning to institutional autonomy based upon the confidence in the ability of institutions to manage. The possibility of fewer external controls, undesignated resources, and more management prerogatives would lift the hearts of many serious administrators.

Interestingly, many educators seem to agree. In 1970, the National Center for Educational Statistics reported that fifty-one percent of the institutions

on the Higher Education General Information Survey (HEGIS) mailing list did not request any limitation on release of financial data submitted by their institutions. About one-third of the respondents requested confidentiality only with respect to individual salaries identified by name or position. The remaining institutions, about fifteen percent, requested restrictions on dissemination of revenue and expenditure data to various governmental and/or nongovernmental groups. In their report, committee members said that they recognized the financial area as "the most controversial with respect to release of institutionally identified data. But given the present financial status of institutions of higher education, secrecy on matters of revenue and expenditures and faculty salary levels seems counter-productive. Confidentiality of individual salaries is still the practice in many private institutions and, in this limited aspect, the option for non-dissemination can be defended." (Association for Institutional Research, 1972.)

Conclusions

Strong basic American ideals, reinforced by tradition and law, bear heavily upon the question of access to information and appear to tip the balance toward full disclosure. In some states, tax-supported institutions now face the possibility of making all records, except personal data specifically exempted by statute, available to nearly anyone who asks. Pledges of confidentiality may be impossible to keep. Records have become increasingly open to individuals about whom they are written, thus making such pledges of confidentiality to counselors, teachers, psychologists, and the like, spurious since the student

will surely find access to his own records. Except to the subjects of such records, however, personal data will probably become more secure in the future. On the other hand, all other kinds of records--details of the receipt and expenditure of public funds, salaries, workloads, program descriptions, costs and benefits, institutional outcomes, and so forth, appear to be headed toward the "full disclosure" category of public information.

The time has probably arrived when higher education will be wise to face up to a future of fuller, if not full, disclosure. Policies must be established, for example, that will limit pledges of confidentiality to those that can be legally kept; that will restrict the quantity and content of data to be collected and maintained so that institutions can meet disclosure demands with minimum discomfort to all concerned; that will educate the public to the wise use of the information; that will agree on standard definitions and procedures for reporting information; that will develop technical procedures that will control misuse of computers and computer-stored data; and that will put houses in order so that such full disclosure enhances credibility and strengthens stature.

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Wisconsin Statutes § 19.21 (1969), § 66.77 (1969).

APPENDIX

THE COLORADO PUBLIC RECORDS LAW OF 1968 (113-2)

CHAPTER 113

PUBLIC RECORDS - RESTORATION AND EVIDENCE

Art. 2. Inspection, copying, or photographing, 113-2-1 to 113-2-6.

ARTICLE 2

Inspection, Copying, or Photographing

113-2-1. Declaration of policy.
113-2-2. Definitions.
113-2-3. Public records open to inspection.
113-2-4. Allowance or denial of inspection - grounds - procedure - appeal.
113-2-5. Copies, print-outs, or photographs of public records.
113-2-6. Violation - penalty.

113-2-1. Declaration of policy. - It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this article or as otherwise specifically provided by law.

Source: Added by L. 68, p. 201, § 1.

113-2-2. Definitions. - (1) As used in this article:

(2) The term "public records" means and includes all writings made, maintained or kept by the state or any agency, institution, or political subdivision thereof for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

(3) The term "writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.

(4) The term "political subdivision" means and includes every county, city and county, city, town, school district, and special district within the state.

(5) The term "official custodian" means and includes any officer or employee of the state or any agency, institution, or political subdivision thereof, who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control.

(6) The term "custodian" means and includes the official custodian or any authorized person having personal custody and control of the public records in question.

(7) The term "person" means and includes any natural person, corporation, partnership, firm, or association.

(8) The term "person in interest" means and includes the person who is the subject of a record or any representative designated by said person except that if the subject of the record is under legal disability, the term "person in interest" shall mean and include his parent or duly appointed legal representative.

Source: Added by L. 68, p. 201, § 2.

113-2-3. Public records open to inspection. - (1) All public records shall be open for inspection by any person at reasonable times, except as provided in this article or as otherwise provided by law, but the official custodian of any public records may make such rules and regulations with reference to the inspection of such records as shall be reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

(2) If the public records requested are not in the custody or the control of the person to whom application is made, such person shall forthwith notify the applicant of this fact, in writing if requested by the applicant. In such notification he shall state in detail to the best of his knowledge and belief the reason for the absence of the records from his custody or control, their location, and what person then has custody or control of the records.

(3) If the public records requested are in the custody and control of the person to whom application is made but are in active use or in storage and therefore not available at the time an applicant asks to examine them, the custodian shall forthwith notify the applicant of this fact, in writing if requested by the applicant. If requested by the applicant, the custodian shall set a date and hour within three working days at which time the records will be available for inspection.

Source: Added by L. 68, p. 202, § 3.

113-2-4. Allowance or denial of inspection - grounds - procedure - appeal. - (1) (a) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

(b) Such inspection would be contrary to any state statute;

(c) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law; or

(d) Such inspection is prohibited by rules promulgated by the supreme court, or by the order of any court.

(2) (a) (i) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

(ii) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, district attorney, police department, or any investigatory files compiled for any other law enforcement purpose;

(iii) Test questions, scoring keys, and other examination data pertaining to administration of a licensing examination, examination for employment, or academic examination; except the written promotional examinations and the scores or results thereof conducted pursuant to civil service, or any similar system shall be available for inspection, but not copying or reproduction, by the person in interest after the conducting and grading of any such examination;

(iv) The specific details of bona fide research projects being conducted by a state institution; and

(v) The contents of real estate appraisals made for the state or a political subdivision thereof relative to the acquisition of property or any interest in property for public use, until such time as title to the property or property interest has passed to the state or political subdivision, except that the contents of such appraisal shall be available to the owner of the property at any time, and except as provided by Colorado rules of civil procedure. If condemnation proceedings are instituted to acquire any such property, any owner thereof who has received the contents of any appraisal pursuant to this section shall, upon receipt thereof, make available to said state or political subdivision a copy of the contents of any appraisal which he has obtained relative to the proposed acquisition of the property.

(b) If the right of inspection of any record falling within any of the classifications listed in this subsection (2) is allowed to any officer or employee of any newspaper, radio station, television station or other person or agency in the business of public dissemination of news or current events, it shall be allowed to all such news media.

(3) (a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law, except that any of the following records other than letters of reference concerning employment, licensing, or issuance of permits shall be available to the person in interest under this subsection (3):

(b) Medical, psychological, sociological, and scholastic achievement data on individual persons, exclusive of coroners' autopsy reports, but either the custodian or the person in interest may request a professionally qualified person, who shall be furnished by the said custodian, to be present to interpret the records;

(c) Personnel files, except applications and performance ratings, but such files shall be available to the person in interest and to the duly elected and appointed public officials who supervise his work;

(d) Letters of reference;

(e) Trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person;

(f) Library and museum material contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions; and

(g) Addresses and telephone numbers of students in any public elementary or secondary school.

(h) Nothing in this subsection (3) shall prohibit the custodian of records from transmitting data concerning the scholastic achievement of any student to any prospective employer of such student, nor shall anything in this subsection (3) prohibit the custodian of records from making available for inspection, from making copies, print-outs, or photographs, or from transmitting data concerning the scholastic achievement, or medical, psychological, or sociological information of any student to any law enforcement agency of this state, of any other state, or of the United States where such student is under investigation by such agency and the agency shows that such data is necessary for the investigation.

(i) Nothing in this subsection (3) shall prohibit the custodian of the records of a school, including any institution of higher education, or a school district from transmitting data concerning standardized tests, scholastic achievement, or medical, psychological, or sociological information of any student to the custodian of such records in any other such school or school district to which such student moves, transfers, or makes application for transfer, and the written permission of such student or his parent or guardian shall not be required therefor. Nor shall any state educational institution be prohibited from transmitting data concerning standardized tests or scholastic achievement of any student to the custodian of such records in the school, including any state educational institution, or school district in which such student was previously enrolled, and the written permission of such student or his parent or guardian shall not be required therefor.

(4) If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied, and shall be furnished forthwith to the applicant.

(5) Any person denied the right to inspect any record covered by this article may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why he should not permit the inspection of such record. Hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and, upon a finding that the denial was arbitrary or capricious, it may order the custodian personally to pay the applicant's court costs and attorney fees in an amount to be determined by the court.

(6) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, he may apply to the district court of the district in which such record is located for an order permitting him to restrict such disclosure.

Hearing on such application shall be held at the earliest practical time. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. In such action the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard.

Source: Added by L. 68, p. 201, § § 1-6; (3) (a) amended by and (3) (g), (3) (h), and (3) (i), added by L. 69, pp. 925, 926, § § 1, 1.

113-2-5. Copies, print-outs, or photographs of public records. - (1) In all cases in which a person has the right to inspect any public record, he may request that he be furnished copies, print-outs, or photographs of such record. The custodian may furnish such copies, print-outs, or photographs for a reasonable fee to be set by the official custodian, not to exceed one dollar and twenty-five cents per page unless actual costs exceed that amount. Where fees for certified copies or other copies, print-outs, or photographs of such record are specifically prescribed by law, such specific fees shall apply.

(2) If the custodian does not have facilities for making copies, print-outs, or photographs of records which the applicant has the right to inspect, then the applicant shall be granted access to the records for the purpose of making copies, print-outs, or photographs. The copies, print-outs, or photographs shall be made while the records are in the possession, custody, and control of the custodian thereof and shall be subject to the supervision of such custodian. When practical, they shall be made in the place where the records are kept, but if it is impractical to do so, the custodian may allow arrangements to be made for this purpose. If other facilities are necessary, the cost of providing them shall be paid by the person desiring a copy, print-out, or photograph of the records. The official custodian may establish a reasonable schedule of times for making copies, print-outs, or photographs and may charge the same fee for the services rendered by him or his deputy in supervising the copying, printing-out, or photographing as he may charge for furnishing copies under subsection (1) of this section.

Source: Added by L. 68, p. 204, § 5.

113-2-6. Violation - penalty. - Any person who willfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment.

Source: Added by L. 68, p. 204, § 6.

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